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No. 638

In the

Supreme Court of the United States

OCTOBER TERM, 1960

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI to the UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745, herein called the Union, prays that a writ of certiorari issue to review the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on October 13, 1960,[1] and November 14, 1960, respectively.

[1]The original Opinion of the Circuit Court was rendered August 18, 1960, but no decree implementing the Opinion was then entered because NLRB sought rehearing. The Opinion on rehearing (which substantially changed the reach of the Order) was rendered October 13, 1960. The Decree itself was entered November 14, 1960.

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet reported (App. A).[2] The Opinion on rehearing is not yet reported (App. B). The Decision and Order of the National Labor Relations Board is reported at 124 NLRB 696 (App. D).

JURISDICTION

The Decree of the Court of Appeals was entered on November 14, 1960 (App. C). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

In the course of a labor dispute the union picketed the employer at his headquarters where some of the non-striking employees reported for work, and also at several construction projects, several miles distant, where the employer was engaged as a subcontractor and employed various craftsmen. As a consequence of the picketing at the construction sites some employees of other sub-contractors on these projects ceased work while other employees did not. The questions presented are:

1.

Whether the Court of Appeals and the NLRB may properly infer from the above stated facts or from the mere fact of picketing at a situs where the primary employer is doing business, but removed from the permanent headquarters place of business of the primary employer, that

[2] "App." refers to Appendices attached to this petition.

the picketing is for the unlawful object of inducing secondary action of employees of secondary employers within the proscription of Section 8(b)(4)(A) of the Labor Management Relations Act of 1947, as amended.

2.

Whether picketing at building construction sites which are jointly occupied by a primary employer and others, found by the NLRB general counsel to be lawful primary activity and accordingly protected by Sections 7 and 13 of the Act and by the First Amendment, and properly directed at the primary employer, may be transformed into unlawful secondary activity proscribed by Section 8(b)(4)(A) of the Act through the action of the primary employer in changing the place of reporting of the non-striking employees.

3.

Whether the NLRB may order cessation of picketing of a primary employer at building construction sites jointly occupied by the primary and secondary employers on the ground that the primary employer had a permanent place of business where the union could and did picket and publicize its dispute to, and solicit the support of, the primary employer's non-striking employees; in other words, whether picketing at one place may be abridged on the plea that it may be exercised at another place.

STATUTE INVOLVED

Section 8(b)(4)(A) and (B) of the National Labor Relations Act, as amended in 1947 (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), makes it "an unfair labor practice for a labor organization or its agents:

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. * * *"

Section 8(b)(4)(A) and (B) has not been amended in any respect material to the questions presented in this petition by Section 704(a), Title VII, Labor-Management Reporting and Disclosure Act of 1959 (P. L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519).

STATEMENT

1. The Stipulated Facts

A. The Original Picketing

The union is the certified representative of the drivers and warehousemen of Macatee, the primary employer involved in the dispute (Tr. 35, 73). In May, 1958, these

"Tr." refers to the printed transcript in the Court of Appeals.

employees struck in support of wage demands which Macatee refused to grant. They engaged in lawful peaceful picketing of Macatee's plant, offices and warehouse, herein called Macatee's headquarters (Tr. 38, ¶7).

In addition to the 35 employees in the driver-warehouse unit, Macatee employs 81 workmen in its construction division (Tr. 36, ¶4). They work at various job sites throughout Dallas County (Tr. 49, ¶14).

At the inception of the strike picketing was limited to the Macatee headquarters (Tr. 38, ¶7, cf. Tr. 49, ¶14). Writing all construction contractors who were members of the Dallas County Construction Employers Association, the union gave the facts of the dispute as the union saw them and expressed the hope that the construction contractors would cease doing business with Macatee "until this labor dispute is settled." (Letter of May 22, 1958, Tr. 46-48.)

By two letters to construction contractors, the union advised that if Macatee should attempt to do work at building sites, the union intended to picket Macatee at such sites. By these letters the union requested the general contractors to grant access to the building site so that the picketing could be "as close to the actual and regular operations of these Macatee employees as possible" (Tr. 46 ff. at 47). The letter continued (Tr. 47-48):

> "Our picket signs will indicate that the dispute is with Macatee, Inc., only, and we will not seek to induce or encourage a concerted refusal by any other employees to perform work or handle goods. Therefore, if strikebreakers come on your job, we hereby

ask permission for our pickets to come within the premises controlled by you and picket directly adjacent to the place where and when Macatee employees are working. Should we not receive such permission within the next three days we shall assume you have refused this request. In that event we may picket the entrances of your job when Macatee employees are working within the job premises. Our only purpose, however, will be the same as stated above. Such picketing will not be directed to your company and to your employees, nor to sub-contractors, and their employees."

No picketing at building sites occurred from the inception of the strike in May, until late in July, 1958. Even at that time, it was preceded by a second letter to the construction contractors (Tr. 44-49):

"Gentlemen:

"Your attention is directed to our letter to you dated May 22, 1958, regarding the Labor dispute between this union and Macatee, Inc.

"In that letter we advised that should a strike breaker, or any other Macatee employee, perform work on any of your jobs or at your premises, we may want to picket it at such primary sites where Macatee employees are working. Such picketing would, of course, be directed to Macatee only. Therefore, we asked you to permit our pickets to come within the premises controlled by you and picket directly adjacent to the place where and when Macatee employees are working. We did not receive such permission; however, we hereby renew that request.

"Unless advised promptly to the contrary, we shall accept your failure to reply as your continued refusal to grant this permission.

"In the event we decide to picket Macatee where its employees are working on any of your jobs, such picketing will be directed against Macatee employees only and not against anyone else.

> "You may use this letter to advise your own employees or employees of other contractors except Macatee employees, that we do not seek to induce or encourage them to refuse to perform any work or to handle Macatee or other materials."

Picketing of Macatee began at construction sites in July, 1958, with signs limited to Macatee. The picketing occurred only at times when Macatee employees were working at such sites. This picketing, which had the incidental effect of causing some employees of other sub-contractors to refuse to work, was challenged by the present charging party's filing a charge with the National Labor Relations Board in Case No. 16-CC-86, alleging a violation of 8(b)(4) (See Bd. App., p. 20, ¶18). After full investigation by the Board's General Counsel, the charge was dismissed on August 15, 1958 (*ibid*, ¶19). An appeal was taken (*ibid*, ¶20 and Exhibit 5), and, thereafter, on December 31, 1958, the General Counsel affirmed the dismissal (*ibid*, ¶20). (Cf. findings, Tr. 51.) Note that the dismissal of the charge was affirmed on the ground that the picketing "was primary rather than secondary activity." The NLRB, in its brief to the Court of Appeals, acknowledged "that the picketing at the construction sites was directed solely at [Macatee's] construction employees." (NLRB Brief to the Court of Appeals, p. 5.)

B. *Employer attempts to change the facts.*

Meanwhile Macatee, after the dismissal of the charge, but while the appeal was still pending, sought to alter the facts. On August 12, 1958, verbal instructions were given Macatee supervisors to begin informing construction em-

ployees to report to work at a vacant lot across the street from Macatee premises. A written notice distributed August 21, 1958, confirmed "the verbal order heretofore issued August 12 to the roofers, and effective August 18 to all personnel" that thereafter employees were to report daily to the office of the company at 4703 Bengal Street for job assignment and details (Tr. 39, ¶10). The second paragraph of the notice changed the reporting place to the "lot directly in front of the office" (Tr. 40).

Thereafter, Macatee employees have *usually* reported to the vacant lot daily * * *" (Tr. 40). However, substantial numbers of Macatee employees could not be reached by pickets at Macatee headquarters—for these employees reported directly to the job sites (See the trial examiner's findings, Tr. 72-78). It is undisputed that according to the picket's observations there were at least 10 to 15 employees reporting directly to job sites each day (Bd. App., p. 7).

Having failed in its earlier attempt to rid itself of the pickets, Macatee, beginning in January, 1959, sought to lay the groundwork for the instant case. Accordingly, it sent the union a letter insisting, erroneously, that pickets at the headquarters could adequately reach all Macatee employees. The Examiner's report reproduces this correspondence (Tr. 52-59, Cf. Bd. Brf., p. 6).

The union insisted that it had a right to continue its picketing which on appeal in Case No. 16-CC-86 had been held by the Board's General Counsel to be "primary rather than secondary activity" (Bd. Brf. to Court of Appeals,

p. 5, ftnt. 2). The union made this clear to the representative of the construction employers (Tr. 56):

> "Macatee does not limit its primary business activity to its plant site on Bengal Street. The legality of the union's full program of picketing Macatee at other locations has been fully determined in N.L.R.B. Case No. 16-CC-86.
>
> "The refusal to issue a complaint therein, and the subsequent refusal to grant the appeal from that decision must be interpreted as a legal decision on which the union may safely rely.
>
> "You are mistaken in referring to secondary job sites for the reason that the union has not engaged in secondary picketing in the past nor does it intend to engage in secondary picketing in the future. All of its picketing has been and will be directed to Macatee and employees of Macatee. Picketing has not and will not be directed to employees of secondary employers."

C. *The picketing in 1959.*

Against the above background the union picketed Macatee at six specified construction sites at which Macatee was working. The details of the picketing are accurately set out in the Examiner's findings (Tr. 60-64). The construction site picketing was conducted by a single picket walking peacefully on the public way and bearing this sign:

> "MACATEE
> BUILDING MATERIALS
> ON STRIKE
>
> We are only picketing Macatee and its employees working on this job site. We are not picketing any other company or employees of any other company.
>
> DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS OF AMERICA—LOCAL 745"

To doubly insure against misinterpretation of the object of the picketing, the union inserted large advertisements in the daily press and in the weekly organ of the Dallas Central Labor Union, which specified *inter alia*:

> "The picketing is directed at Macatee and its employees only."

The effect of the job site picketing was varied. At some sites the pickets were ignored. At others they caused cessation of work. At still others, some employees ceased, others continued, working. We list in the margin the sites and effects.[4]

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[4]

Job Site	Dates of Picketing	Macatee Employees	Other Employees	Record Citation
Richardson	2/24-2/26/59	left by noon 2/25—other Macatee employees worked 2/26 but did not return thereafter.	most remained at work "some" left before noon 2/24—all by noon 2/25	Tr. 60
John Deere	2/26-2/27/59	2/27 "before the completion of the work day"—Resumed 3/26/59	Some truck drivers refused to cross picket line. Others crossed (Tr. 62). No effect on other construction employees.	Tr. 61-62
Exchange Park	3/3 (2 hrs).	Picketing ceased upon Macatee's leaving the job site.	"Some" ceased work but did not leave the job site.	Tr. 62
Reserve Life	3/6 (1 hr.)	Picketing ceased upon Macatee leaving site	"Some neutrals ceased work"	Tr. 63
DuBoise	3/9 (2 hrs.)	Macatee left so did pickets	Ceased work while pickets were present	Tr. 63
	3/16 (20 min.)	(ditto)	(ditto)	
Great Southwest	3/13 (noon-4:30)	Kept on working	Kept on working	Tr. 63
	3/18 (all day)	Kept on working	Kept on working	Tr. 63

2. The Trial Examiner's Findings

The Trial Examiner's lengthy Intermediate Report (Tr. 34-82) recites stipulated facts and concludes that he is bound by the Board's prior *Otis Massey* decision which he finds "dispositive of the major issue herein" (Tr. 73-78). The Trial Examiner noted that the Court of Appeals had refused to enforce *Otis Massey*, but he, "with all due respect" for the Court of Appeals, held, "I must follow the *Board's* decision in *Otis Massey* unless or until the Board or the United States Supreme Court decides otherwise" (Tr. 77).

3. The Board's Decision

The Board issued a "short-form" Decision (Tr. 114-116) holding the picketing at construction sites unlawful, and based this decision *only* upon the following:[5]

1. That Macatee had a permanent place of business at which union could and did picket.
2. That union had requested employers to cease doing business with Macatee until the labor dispute was settled.
3. Some employees of secondary employers ceased work when pickets appeared.
4. At a single construction site pickets marched past 3 of 4 instead of only 2 of the 4 gates entering the project.

In reaching the conclusion that the job site picketing was for the unlawful purpose of inducing employees of sec-

[5]The Board rejected "the supposed analogy to the *Otis-Massey* case" which the Trial Examiner had found. See the footnote to Board decision (Tr. 116).

ordinary employers to discontinue work with an object of forcing neutral employers, the Board ignored and did not so much as note the stipulated and undisputed facts which indicate valid *primary* activity, viz:

1. The finding of primary activity, and its affirmance by the Board's General Counsel. *Supra*, p. 7 ff.

2. Union letters sent broadside to every contractor in Dallas stating (Tr. 49):

   "* * * You may use this letter to advise your own employees, or employees of other contractors except Macatee employees, that we do not seek to induce or encourage them to refuse to perform any work or to handle Macatee or other materials."

3. Dallas Morning News advertisement by which Union (Tr. 65):

   "* * * hereby advises all interested parties that its dispute is solely with Macatee * * * the picketing is directed at Macatee and its employees only * * *."

4. Similar notice in the labor paper, *The Dallas Craftsman*. (Tr. 67.)

5. The manner of the picketing:

   A. The timing and placing of pickets was only when Macatee occupied and was working on the site.

   B. The legend on the picket sign, viz.:

      "We are picketing Macatee only—not any other persons or firm."

Failing to note any of these stipulated facts, the Board, based on its judgment that the union could adequately communicate its message if picketing was limited to Macatee headquarters, entered an order requiring the union to desist from picketing at the construction sites.

4. The Opinion of the Court of Appeals

The Court of Appeals enforced (*infra*, App. A) "for the reasons already adequately stated in the Board's decision", and on the authority of its own decision in *Superior Derrick Corporation v. N.L.R.B., 273 F. 2d 891 (C. A. 5, 1960).*

The basis implicit in the decisions of the Board and the Fifth Circuit Court in this case, as well as in *Superior Derrick*, and those cases cited therein, is that *it may be inferred from the mere fact of picketing at a situs removed from the permanent place of business of the primary employer that the picketing is for the unlawful object of inducing secondary action.*

REASONS FOR GRANTING THE WRIT

1.

Circuit Courts of Appeals are at wide divergence in determining the standard which should govern in ascertaining whether picketing at a common situs jointly occupied by a primary employer and a neutral employer is primary or secondary.

The view of the court below has been specifically stated by that court to be in conflict with the rationale endorsed by other Courts of Appeals. Compare the Fifth Circuit's decision in *Retail, Wholesale etc. v. Rains, 266 F. 2d 503, 505-506 (C. A. 5, 1959)* affirming a temporary injunction under 10(1) of the Act, with the later decision (by the Court of Appeals for the District of Columbia) in the same case *sub nom, United Wholesale etc. v. N.L.R.B., 282 F. 2d*

824 (C. A. D. C., 1960), refusing to prohibit such picketing. This is but a single instance of many litigants "circuit shopping" between the Fifth and the District of Columbia Courts of Appeals in 8(b) (4) cases. This rush to a forum with advantageous precedent will doubtless continue until the Supreme Court resolves the "difference in approach of this [Fifth Circuit] Court and some other circuits". *Superior Derrick, supra, at 895.*

The rule applied by the Fifth Circuit in the six southern states—and applied in the instant case—is that picketing at places removed from the so-called primary situs becomes secondary by the very act of such picketing. This is the holding of a long line of cases in the Fifth Circuit, viz.: *Superior Derrick v. N.L.R.B., 273 F. 2d 891 (C.A. 5, 1960); N.L.R.B. v. Dallas General Drivers (Associated Wholesale Grocers), 264 F. 2d 642 (C. A. 5, 1959); Retail, Wholesale etc. Union v. Rains, 266 F. 2d 503, 505-506 (C. A. 5, 1959); Local 450 v. Elliott, 256 F. 2d 630 (C. A. 5, 1958); N.L.R.B. v. Truck Drivers & Helpers, etc., 228 F. 2d 791 (C. A. 5, 1956).*[6]

The rule applied in other circuits is one which accommodates the right of the union to picket the primary employer [a right guaranteed by Sections 7 and 8(a)(1) and 13 of the Act] with the right of the neutral employer to be free of picketing [a right guaranteed by Section 8(b)(4) of the Act]. *N.L.R.B. v. Service Trades Chauffeurs, 191 F. 2d 65, 68 (C.A. 2, 1951); N.L.R.B. v. Local 50, Bakery & C. Wkrs.,*

[6]The only case to the contrary in the Fifth Circuit is *N.L.R.B. v. General Drivers (Otis-Massey), 225 F. 2d 205 (C. A. 5, 1955), cert. denied, 350 U. S. 914.* This is a unanimous opinion by Circuit Judge Rives, sitting with two district judges, which has not been followed in the last five years.

etc. (Arnold Bakers), 245 F. 2d 542 (C. A. 2, 1957); N.L.R.B. v. Business Mach. & Office A., etc. (Royal Typewriter), 228 F. 2d 553 (C. A. 2, 1955), cert. denied 351 U. S. 962; Local 618, etc. v. N.L.R.B. (Site Oil), 249 F. 2d 332, 335 (C. A. 8, 1957); Seafarers International Union v. N.L.R.B. (Salt Dome), 265 F. 2d 585, 589 (C.A.D.C., 1959); Sales Drivers Union v. N.L.R.B. (Campbell Coal), 229 F. 2d 514 (C.A.D.C., 1955), certiorari denied, 351 U. S. 972; United Wholesale etc. v. N.L.R.B., 282 F. 2d 824, (C.A. D.C., 1960).

The Supreme Court has never addressed itself to the question of multiple-situs picketing. The Court of Appeals for the District of Columbia, in holding pertinent "the Supreme Court's summary of the proscription of the Act * * *" rendered in another context, quotes at length from this Court's "hot cargo" Opinion. *Local 1976 v. N.L.R.B., 357 U. S. 93, 98.* The District of Columbia Circuit, while noting the "difficulties inherent in varying factual situations presenting recurring problems * * *", and noting further both the rationale of the Supreme Court's *Rice Milling*[1] decision and certain isolated statements made in connection with that picketing, held in accordance with the rationale of the cited Supreme Court cases that "* * * mere picketing at a common situs under the circumstances shown on this record, does not justify an enforcement order", *United Wholesale, etc. v. N.L.R.B., 282 F. 2d 824, 827, 828.* The Fifth Circuit's *Rains, Associated Wholesale Grocers,* and *Superior Derrick* cases, *supra*, and the instant case are to the contrary.

[1] *N.L.R.B. v. International Rice Milling Co., 341 U. S. 665.*

In *Rains*, the Fifth Circuit views as ambiguous the very same Supreme Court opinion which the Court of Appeals for the District of Columbia recognizes as precise and definitive, viz.: To the Court of Appeals for the District of Columbia "it is difficult to see how the basic elements of a section 8(b)(4)(A) unfair labor practice charge could more specifically be spelled out." *United Wholesale, etc., supra, at 827.* But the Fifth Circuit, in *Rains*, insists that the same Supreme Court decision *(Local 1976, supra)* far from being specific and definitive, is a "kind of discursive disquisition * * * in regard to the secondary boycott provision * * * [which] was not determinative as to whether this [Fifth Circuit] court will go with the decisions of the Second Circuit * * * [or with] * * * the decisions of this Court [citing cases which] seem to look the other way." *Retail Wholesale, etc. v. Rains, 266 F. 2d 503, at 506.*

Since the *Rains* decision, the Fifth Circuit has continued to follow its own line of authority, viz.: *Superior Derrick* and the instant case. Meanwhile the Court of Appeals for the District of Columbia remains consistent with the contrary line of authority developed principally in the Second and District of Columbia Circuits. The conflict comes to the point that the identically same stipulated facts are decided one way at an early stage of the proceeding by the Fifth Circuit in *Rains, 266 F. 2d 503 (C. A. 5, 1959)*, and the other way at a later stage in the same proceeding by the Court of Appeals for the District in *United Wholesale, etc. v. N.L.R.B., 282 F. 2d 824 (C.A.D.C., 1960).*

While the Supreme Court has not decided any case involving common situs picketing, it has denied certiorari to

cases holding both ways. Thus common situs picketing held lawful was allowed to continue in *N.L.R.B. v. General Drivers (Otis-Massey), 225 F. 2d 205 (C. A. 5, 1955), cert. den. 350 U. S. 914; Sales Drivers Union v. N.L.R.B. (Campbell Coal), 229 F. 2d 514 (C. A. D. C., 1955), cert. den. 351 U. S. 972.* Cf. *N.L.R.B. v. Business Machine & Office A., etc. (Royal Typewriter), 228 F. 2d 553 (C. A. 2, 1955), cert. den. 351 U. S. 962.* But an injunction against such picketing was allowed to stand in *Seafarers International Union v. N.L.R.B. (Superior Derrick), 273 F. 2d 891 (C. A. 5, 1960), cert den. U. S. ;* Cf. *N.L.R.B. v. Dallas General Drivers (Associated Wholesale Grocers), 264 F. 2d 642 (C. A. 5, 1959), cert. den. U. S.* .*

Questions as to the applicable standards governing whether picketing at a common situs is primary or secondary will continue to plague the Courts of Appeal. Single minded attention to the limitation of Section 8(b)(4), without accommodation of the rights to concerted activity guaranteed by Sections 7, 8(a)(1) and 13, will continue to lead to the error which this Court recently noted in the *Curtis* case *(N.L.R.B. v. Drivers Union, U. S. , 4 L. Ed. 710)*, viz: assumption of the power in the Board to condemn use of a specific economic weapon, i.e. peaceful picketing, without regard to the scheme of the statute and to the fact that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions * * *."

*In *Truck Drivers Union v. N.L.R.B., 249 F. 2d 512 (C. A. D. C., 1957), cert. den. 355 U. S. 958*, the Court reconsidered the matter it had remanded to the Board in *229 F. 2d 514*. The Board, in compliance with the Court's order, looked to several factors other than picketing at a common situs and found a violation of 8(b)(4). The Court affirmed this second Board decision because the Board had relied on factors other than the mere fact of the picketing. In the instant case those distinguishing factors are not present.

2.

The common situs picketing here found unlawful was in the earlier charge held primary and lawful, *supra*, p. 7 ff. The conversion to unlawful secondary picketing was accomplished solely by the employer's changing his instructions as to the place of employees reporting for work. We submit that it is improper to permit the employer to change the employees' picketing from lawful to unlawful action by his own acts. The Court of Appeals for the District of Columbia so held in *Seafarers International Union v. N.L.R.B. (Salt-Dome), 265 F. 2d 585 (C. A. D. C., 1959).* But the Fifth Circuit explicitly stated in *Superior Derrick* that "we find ourselves unable to accept the rationale of *Seafarers Intl. Union v. N.L.R.B. (Superior Derrick)* * * *", *273 F. 2d 891, 896.*

If the instant decision is allowed to stand, the right to picket itself (a right guaranteed by Sections 7 and 13 of the Act, and having at least some constitutional protections, cf. *Chauffeurs, etc. v. Newell, 356 U. S. 341)* is left at the discretion of the employer. For the sole purpose of destroying the union's effectiveness, he could remove his "primary" situs to a completely isolated area, require his employees to report to that situs, and then truck them all to the true place of work. The opportunity afforded employers by this theory would apply equally to industrial plant owners as to the construction industry. The union would be effectively deprived of any right to picket whatsoever. For, if the union picketed at the real place of business, where employees of other employers were bound to

appear, there would be a violation of Section 8(b)(4). Surely it is wrong to permit the exercise of the "working man's means of communication"—his basic constitutional means of free speech—to be dependent upon the action of the employer. The Texas Supreme Court has recently recognized that to so "place in the hands of the employer complete control over labor controversies * * * would result in an intolerable situation." *International Union, etc. v. Cox, 219 S. W. 2d 787 at 793 (Tex. Sup. 1949).*

CONCLUSION

For the reasons stated this petition for certiorari should be granted.

Respectfully submitted,

L. N. D. WELLS, JR.,
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Dallas 1, Texas.

DAVID PREVIANT,
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Milwaukee 3, Wisconsin.

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Washington, D. C.,
Attorneys for Petitioner.

Of Counsel:

MULLINAX, WELLS, MORRIS & MAUZY

GOLDBERG, PREVIANT & COOPER

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(August 18, 1960.)

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: The questions presented for decision are: (1) whether substantial evidence supports the Board's finding that the respondent union intended, by its picketing at construction projects, to induce work stoppages by em-

ployees of contractors other than Macatee, Inc. and thereby violated Section 8(b)(4)(A) of the National Labor Relations Act[1] and (2) whether the Board's order is too broad.

The Trial Examiner, after a two-day hearing, made findings of fact "upon the entire record in the case, including stipulations of the parties, and from my observation of the witnesses," which comprise thirty-five pages of the printed record. The Board adopted the findings of the Trial Examiner, and based its conclusion that the picketing of construction sites was for such unlawful objective upon the following:

> "(1) The primary employer, Macatee, had a permanent place of business where all its employees, including those not directly involved in the labor dispute with the Respondent Union, regularly reported, and where the Respondent Union could and did publicize its dispute to, and solicit the support of, Macatee's employees.[2] If the Respondent Union's object was only to seek the support of the primary employer's employees, there was no need for picketing the premises of neutral employers.

[1] Section 8(b)(4)(A) of the Act, as it was in effect during the events in this case, provides that it shall be an unfair labor practice for a labor organization or its agents—

> "* * * to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment * * * or to perform any services where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person."

Section 8(b)(4) was amended in the Fall of 1959, and the provision applicable here was renumbered as Section 8(b)(4)(B). See Public Law 86-257, 1959.

[2] *Amarillo General Drivers, Warehousemen and Helpers Local Union No. 577, (Crowe-Gulde Cement Company)*, 122 NLRB No. 153.

"'(2) The Respondent Union's letter to employers in the construction industry in Dallas requesting them to cease doing business with Macatee until the labor dispute was settled.[3]

"(3) In many instances, employees of neutral employers quit work when Respondent Union's pickets appeared.[4]

"(4) On February 26 and 27, 1959, Respondent Union's pickets picketed the entire length of the John Deere property facing on Harry Hines Boulevard rather than limiting themselves to the area adjacent to the place where Macatee's employees were working on the project.[5] On February 25, 1959, Respondent Union's pickets continued picketing the Richardson project for 2 hours after the Macatee's and other employer's employees had ceased working and had left the job.

"In view of the foregoing, we find, as did the Trial Examiner, that Respondent Union violated Section 8(b)(4)(A) by its picketing at the construction sites of neutral employers.[6]

---

[3] *Idem.* (In this case a substantially identical letter was held evidence of the respondent union's objective in engaging in secondary employer picketing. See fn. 4): *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 904 (C. A. 2); *N.L.R.B. v. Denver Building and Construction Trades Council*, 193 F. 2d 421, 423-424 (C. A. 10).

[4] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company), supra.*

[5] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company), supra.*

[6] In affirming the conclusion of the Trial Examiner, we have not adopted his reasoning based on the supposed analogy to the *Otis Massey* case (109 NLRB 275, enf.den. 225 F. 2d (C. A. 5), cert. den. 350 U. S. 914). In *Otis Massey*, the circuit court refused to enforce the Board's decision because it felt that the Board had ignored evidence which it regarded as establishing that the respondent union was not picketing for an unlawful objective. The court later pointed out that in its *Otis Massey* decision the other employees of the primary employer at the common construction

(Continued on next page)

The recommendations of the Trial Examiner included the following:

> "* * * As this is not the first such violation in which the Respondent has engaged,[29] it may reasonably be expected that the Respondent will continue to commit similar violations in the future. Therefore the recommended order will not be limited only to the individual employers named herein, but instead will apply to any other employers as well.[30]

The Board's Order broadly required the respondent union to:

> "1. Cease and desist from engaging in, or inducing or encouraging employees of *employers other than Macatee, Inc.* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require *any employer or other*

(Continued from preceding page)

situs picketed 'almost never came to the primary employer's principal situs, the warehouse,' and the criteria evolved by the Board in *Moore Drydock* (92 NLRB 547) 'were scrupulously observed.' *NLRB v. Truck Drivers and Helpers (National Trucking Co.)*, 228 F.2d 791, 796 (C. A. 5). See also *N.L.R.B. v. Associated Musicians*, 226 F. 2d 900, 906 (C. A. 2). In the present case, we rely for our finding of illegal objective not only on the fact that the primary employer had a permanent place of business where the Respondent Union could adequately publicize its dispute to all employees of the primary employer, including these not directly involved in the dispute, but also on the other evidence set forth above."

"[29] *Dallas General Drivers, Warehousemen & Helpers, etc. (Associated Wholesale Grocery of Dallas, Inc.)*, 118 NLRB 1251, enf. 43 LRRM 2696 (C. A. 5). See also *Dallas General Drivers, Warehousemen & Helpers, etc. (Hildebrand Warehouse Company)*, 111 NLRB 1313, where the Respondent complied with the Trial Examiner's recommended order.

"[30] *Local 926, International Union of Operating Engineers, AFL-CIO (Armco Drainage and Metal Products, Inc.)*, 120 NLRB 188, 189."

person to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company *or any other company.*" (Emphasis supplied.)

and to post specified notices and make certain reports.

The respondent union makes no attack upon the findings of fact by the Trial Examiner, but earnestly insists that the record taken as a whole does not present a substantial basis of believable evidence pointing toward the unlawful motive. See *N.L.R.B. v. General Drivers, etc.*, 5 Cir., 1955, 225 F. 2d 205, 211; compare *N.L.R.B. v. Dan River Mills*, 5 Cir., 1960, 274 F. 2d 381, 385.

After carefully studying the record and considering the briefs and arguments, we find that the Board's finding is supported by substantial evidence for the reasons already adequately stated in the Board's decision. See also *Superior Derrick Corporation v. N.L.R.B.*, 5 Cir., 1960, 273 F. 2d 891.

As to the breadth of the Board's order, the Board's brief is silent. The Board failed to rule upon Exception #14 of the respondent union raising the point.[2] Upon the author-

[2] "Union excepts to the expansion of the order beyond the employers named in the Complaint to apply to all employers without limitation, for the reason that there is no pleading to support such order, for the further reason that respondent has never been notified that such order was sought nor had any opportunity to defend against such order, and for the further reason that there is no evidence to support such order. Said order is too broad and beyond the Board powers for the reasons set forth in the decision of the United States Court of Appeals for the Fifth Circuit in N.L.R.B. v. Ford Motor, 119 F. 2d 326 (C. A. 5, 1941) and N.L.R.B. v. Local 926 Operating Engineers, 267 F. 2d 418, 44 L.R.R.M. 2201 (C. A. 5, May 26, 1959), and Truck Drivers, etc. No. 728 v. N.L.R.B., 265 F. 2d 439."

ities cited by the respondent union in its exception (footnote 2, *supra*), and upon the recent Supreme Court decision in *Communication Workers, etc. v. N.L.R.B.*, U. S. No. 418, Oct. Term, 1959, m/s, decided May 2, 1960, 28 L.W. 4291, and our decision in *N.L.R.B. v. Local 926, etc.*, 5 Cir., 1959, 267 F. 2d 418, 421, we hold that that part of the order of the Board heretofore quoted is too broad and should be modified to read as follows:

> "1. Cease and desist from engaging in, or inducing or encouraging employees of *J. W. Bateson Company, Inc. or Gower & Folsom Construction Company* to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is to force or require *J. W. Bateson Company, Inc. or Gower & Folsom Construction Company* to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that Company."

As so modified the order of the Board is Enforced.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(October 13, 1960.)

ON PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR REHEARING

Before RIVES, Chief Judge, and CAMERON and BROWN, Circuit Judges.

PER CURIAM: In the light of *IBEW Local 501 v. N.L.R.B.*, 1951, 341 U. S. 694, 705-706, it appears that in

that part of the order quoted in our original opinion the Board properly used the first two phrases which we italicized, viz.: (1) "employers other than Macatee, Inc.," (2) "any employer or other person." Only the final phrase of that part of the order should be stricken, viz.: "or any other company."

As so modified, the order of the Board is enforced. In other respects the petition for rehearing is denied.

APPENDIX C

(Original Filed—November 14, 1960)

United States Court of Appeals
FOR THE FIFTH CIRCUIT

18091

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,
Respondent.

DECREE ENFORCING, AS MODIFIED, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: Rives, Chief Judge, and Cameron and Brown, Circuit Judges.

By the Court:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 24, 1959. The Court heard argument of respective counsel on May 17, 1960, and has considered the briefs and transcript of record filed in this cause. On

August 18, 1960, the Court, being fully advised in the premises, handed down its opinion enforcing as modified, the Board's Order. Thereafter, pursuant to the Board's petition for rehearing filed September 6, 1960 and Respondent's opposition thereto, filed September 26, 1960, this Court on October 13, 1960, handed down its decision re-instating and enforcing certain provisions of the Board's order which had been deleted by the original decision of August 18, 1960. Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit that Dallas General Drivers, Warehousemen and Helpers Local Union No. 745, its officers, representatives, agents, successors and assigns shall:

1. Cease and desist from engaging in, or inducing or encouraging employees of employers other than Macatee, Inc. to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Post at its offices and at all other places where notices to members are customarily posted, copies of the

notice attached hereto marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the Sixteenth Region, Fort Worth, Texas, shall, after being duly signed by an official representative of Respondent be posted immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the aforesaid Regional Director signed copies of said notice for posting at the plants and projects listed on Appendices B and C attached hereto the companies willing, in places where notices to employees are customarily posted.

(c) Notify the said Regional Director in writing, within ten (10) days from the date of this Decree, of the steps it has taken to comply therewith.

ENTERED: November 14, 1960

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Decree of the United States Court of Appeals enforcing as modified, an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in or induce or encourage employees of employers other than Macatee, Inc. to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

Dated By
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Boek Construction Company
Wm. H. LaDew Company
Russell Plumbing Company

Ed Hogan, d/b/a Hogan Plastering Contractor
American Roofing Company
Gotham Electric Company
Crisp & Vaughn

APPENDIX C

Richardson school project
John Deere project
Exchange Park project

Reserve Life Insurance project
DuBoise, Highway 75 project
Great Southwest Corporation project

APPENDIX D

124 NLRB No. 87 D-943
Dallas, Texas

DECISION AND ORDER

(Number and Title Omitted)

On June 5, 1959, Trial Examiner Sydney S. Asher, Jr. issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter the General Counsel, the Charging Party, and the Respondent filed exceptions to the Intermediate Report together with supporting briefs.

The Board[1] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, the briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following additions and modifications.

We agree with the Trial Examiner that Respondent Union, by its picketing at the construction sites of neutral

[1] Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

employers, induced or encouraged employees of such neutral employers to discontinue work with an object of forcing or requiring the neutral employers to cease doing business with Macatee, Inc., the primary employer.

We base our conclusion that the picketing of construction sites was for such unlawful objective upon the following:

(1) The primary employer, Macatee, had a permanent place of business where all its employees, including those not directly involved in the labor dispute with the Respondent Union, regularly reported, and where the Respondent Union could and did publicize its dispute to, and solicit the support of, Macatee's employees.[2] If the Respondent Union's object was only to seek the support of the primary employer's employees, there was no need for picketing the premises of neutral employers.

(2) The Respondent Union's letter to employers in the construction industry in Dallas requesting them to cease doing business with Macatee until the labor dispute was settled.[3]

(3) In many instances, employees of neutral employers quit work when Respondent Union's pickets appeared.[4]

---

[2] *Amarillo General Drivers, Warehousemen and Helpers Local Union No. 577 (Crowe-Gulde Cement Company)*, 122 NLRB No. 153.

[3] *Idem.* (In this case a substantially identical letter was held evidence of the respondent union's objective in engaging in secondary employer picketing. See fn. 4): *N.L.R.B.* v. *Associated Musicians*, 226 F. 2d 900, 904 (C. A. 2); *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 193 F. 2d 421, 423-424 (C. A. 10).

[4] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company)*, *supra*.

(4) On February 26 and 27, 1959, Respondent Union's pickets picketed the entire length of the John Deere property facing on Harry Hines Boulevard rather than limiting themselves to the area adjacent to the place where Macatee's employees were working on the project. On February 25, 1959, Respondent Union's pickets continued picketing the Richardson project for 2 hours after Macatee's and other employer's employees had ceased working and had left the job.

In view of the foregoing, we find, as did the Trial Examiner, that Respondent Union violated Section 8 (b) (4) (A) by its picketing at the construction sites of neutral employers.[6]

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[5] *Amarillo General Drivers, Warehousemen and Helpers, Local Union No. 577 (Crowe-Gulde Cement Company), supra.*

[6] In affirming the conclusion of the Trial Examiner, we have not adopted his reasoning based on the supposed analogy to the *Otis Massey* case (109 NLRB 275, enf. den. 225 F. 2d (C. A. 5), cert. den. 350 U. S. 914). In *Otis Massey*, the Circuit Court refused to enforce the Board's decision because it felt that the Board had ignored evidence which it regarded as establishing that the respondent union was not picketing for an unlawful objective. The court later pointed out that in its *Otis Massey* decision the other employees of the primary employer at the common construction situs picketed "almost never came to the primary employer's principal situs, the warehouse," and the criteria evolved by the Board in *Moore Drydock* (92 NLRB 547) "were scrupulously observed." *N.L.R.B. v. Truck Drivers and Helpers (National Trucking Co.)*, 228 F. 2d 791, 796 (C. A. 5). See also *N.L.R.B.* v. *Associated Musicians*, 226 F. 2d 900, 906 (C. A. 2). In the present case, we rely for our finding of illegal objective not only on the fact that the primary employer had a permanent place of business where the Respondent Union could adequately publicize its dispute to all employees of the primary employer, including these not directly involved in the dispute, but also on the other evidence set forth above.

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent Union, Dallas General Drivers, Warehousemen and Helpers Local Union No. 745, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from engaging in, or inducing or encouraging employees of employers other than Macatee, Inc. to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport; or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of Macatee, Inc., or to cease doing business with that company or any other company.

(2) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its offices and at all other places where notices to members are customarily posted, copies of the notice attached hereto marked "Appendix A." Copies of said notice to be furnished by the Regional Director for the

"In the event that the order is enforced by a decree of a United States Court Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER."

Sixteenth Region, shall, after being duly signed by an official representative of Respondent Union, be posted immediately upon receipt thereof and be maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Sixteenth Region signed copies of said notice for posting at the plants and projects listed on Appendices B and C attached to the Intermediate Report, the companies willing, in places where notice to employees are customarily posted.

(c) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Decision and Order, of the steps it has taken to comply herewith.

Dated, Washington, D. C. Aug 24 1959

Philip Ray Rodgers, Member

Stephen S. Bean, Member

John H. Fanning, Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in, or induce or encourage employees of employers other than MACATEE, INC. to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; where an object thereof is to force or require any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of MACATEE, INC. or to cease doing business with MACATEE, INC. or any other company.

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

Dated By
(Representative) (Title)

This notice must remain posted for sixty (60) days from the date hereof, and must not be altered, defaced, or covered by any other material.

FILE COPY

FILED
FEB 10 1961
JAMES R. BROWNING

No. 638

In the Supreme Court of the United States

OCTOBER TERM, 1960

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 475, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LEE M. MODJESKA,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

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Section 8(b)(4)(A)	7, 9

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 638

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 475, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court of appeals and its opinion on rehearing (Pet. App. 1–8) are reported at 281 F. 2d 593. The decision and order of the National Labor Relations Board (R. 114–118)[1] are reported at 124 NLRB 696.

[1] "R." references are to portions of the Transcript of Record printed pursuant to the rules of the court below as Volume I. "B.A." references are to portions of the testimony and exhibits printed as an appendix to the Board's brief below.

JURISDICTION

The decision of the court of appeals was entered on August 18, 1960 (Pet. App. 1; p. 15). A petition for rehearing, filed by the Board, was granted in part on October 13, 1960 (Pet. App. 7). The petition for a writ of certiorari was filed on January 9, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record considered as a whole supports the Board's conclusion that the Union's picketing at construction projects, at which both employees of the primary employer and those of neutral employers were working, was intended to induce work stoppages by the latter, in violation of Section 8(b)(4)(A) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), is set forth at p. 4 of the petition.

STATEMENT

A. *The Board's Findings of Fact.*[2]—Macatee, Incorporated, is a dealer in wholesale and retail building materials and supplies, and a contractor in the building and construction industry (R. 35). The building materials division is carried on by truckdrivers, helpers, glass cutters, warehousemen, shipping and receiving clerks, and machinists or

[2] The underlying facts upon which the Board's findings rest were stipulated to by the parties below (R. 35; B.A. 1–26).

mechanics, all of whom work in or out of the Company's warehouse and office, and are represented by petitioner Union pursuant to a Board certification (R. 35). The construction division employs approximately 81 building tradesmen such as carpenters, roofers, sheetmetal workers, and laborers, none of whom is included in the certified bargaining unit (R. 36).

Prior to the events in this case, the construction division employees reported to the Company's office on an average of three times per week to receive new job assignments, or to pick up materials and equipment or weekly paychecks (R. 36). In this group of employees were approximately 25 in the deck department and 20 in the roofing department who ordinarily reported daily at Macatee's premises (R. 37).

On May 12, 1958, petitioner Union caused a strike of the employees in the building materials division in support of contract demands. At the outset of the strike, picketing was limited to the Company's premises where its plant, office, and warehouse were located (R. 38). However, the Company changed the requirement that the construction division employees report regularly to the Company's office. Some of these employees began reporting at a vacant lot across the street from the Company's office, and others went directly from their homes to their job sites or reported at other locations removed from the Company's premises (R. 39).

In July 1958, the Union undertook to reach the latter group of employees by picketing at the construction projects where they were working during the

time they were on the job (R. 49). Prior to this picketing, the Union wrote letters to contractors in the Dallas area informing them of the strike, and requesting that they "make no purchases from or do any business with Macatee, Inc., until this labor dispute is settled" (R. 46). The letters also requested permission to picket directly on any work site where the Company's employees were on the job, and added that, if no reply were received, the Union would assume that the request had been denied and would picket "the entrances of your job wher Macatee's employees are working" (R. 47, 48). None of the contractors granted the Union permission to picket on the job site, and the Union's picketing was accordingly carried on at the entrances to the projects (R. 49).[3]

About August 12, 1958, the Company issued new orders respecting the reporting practices of its construction employees. All such employees were told to report each morning before work to the vacant lot across the street from the Company's office (R. 39).

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[3] The Company filed an unfair labor practice charge based on the July picketing, alleging a violation of Section 8(b)(4)(A) of the Act, but it was dismissed following investigation by the Regional Director (R. 51). The dismissal was sustained on appeal to the General Counsel on the ground that the picketing "was primary rather than secondary activity" (B.A. 42). The General Counsel's ruling noted that the picketing was carried on at a time when the Company "required the construction employees to report at various temporary assembly locations all of which were considerably removed from the plant," with the result that such employees could not effectively be reached by the picketing at the Company's premises, and that the picketing at the construction sites was directed solely at the Company's construction employees (B.A. 41).

With but few exceptions, all the employees complied with the reporting instructions and thus daily saw the pickets at the Company's premises, and the signs that they carried (R. 40). The carpenters and carpenter helpers, however, were reluctant to report to work at the site of the picketing, and arranged with the Company to report at a point approximately 75 feet north of the Macatee property (R. 41). Similarly, the employees in the roofing and deck departments refused to cross the picket line and assembled in the street (R. 36, 42). But both groups still remained within full view of the pickets.

In January and early February 1959, the Company and the Dallas County Construction Employers' Association, Inc., corresponded with the Union for the purpose of making clear that all construction employees were required to report daily at or near the Company's office and within sight of the picketing of the Company's premises (R. 52–55, 57–59). In addition, the letters expressed the view that any recurrence of the picketing at the construction projects, in these circumstances, would be unlawful, and requested that no such picketing be undertaken (R. 57–59).

In late February 1959, however, the Union reinstituted its picketing activities at construction projects where employees of the Company were working (R. 60). On each of these occasions the picketing was conducted on public property adjacent to the job site, and the legends on the signs read (R. 59):

MACATEE BUILDING MATERIALS ON STRIKE

> We are only picketing Macatee and its employees working on this job site. We are not picketing any other Company or employees of any other company.
>
> DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS OF AMERICA—LOCAL 745

In most instances, the picketing caused the employees of neutral contractors who were working on the projects to stop work. Moreover, at the Richardson school job, the picketing continued for at least two hours after the Macatee employees had left the job. And, at the John Deere project, the picketing was not confined to the area where the Macatee employees were working but covered the entire property, including an entrance rarely used by Macatee, and, as a result of the picketing, employees of seven different trucking companies refused to pick up and make deliveries at the project (R. 60–63).

During the course of the above-described picketing, the Union also extended the picketing at the Company's premises. On March 27, 1959, the Union picketed the vacant lot across from the Company's office, where a number of the construction division employees reported (R. 41). During succeeding days, the pickets also appeared at other locations near the Company's premises where other employees, particularly the carpenters, had been assembling, and, as the assembly points were relocated on and nearby the Company's premises, the Union readjusted the picketing to cover such places (R. 42–45).

B. *The Board's Conclusions and Order.*—The Board found that the Union violated Section 8(b)(4)(A) by its picketing activities on and after February 24, 1959, at the various construction projects on which the Company's construction division employees were working. In finding that such picketing was intended, at least in part, to induce employees of other contractors to engage in work stoppages, contrary to Section 8(b)(4)(A), the Board relied upon the following circumstances: (1) the Union had adequate opportunity to reach the Company's employees by its picketing activities at the Company's premises, where all employees were required to report daily; (2) the Union's letters to contractors in the Dallas area stated that the Union desired the contractors to cease doing business with the Company; (3) employees of other contractors on the job sites frequently stopped work in response to the picketing; and (4) the manner of picketing at some of the construction projects was not consistent with a purpose to restrict the appeal to the Company's employees (Pet. App. 14–16; R. 114–116). The Union was ordered to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. App. 17–18; R. 117–118).

C. *The Decision of the Court of Appeals.*—The court of appeals, except for modifications not material here,[4] enforced the Board's order (Pet. App. 1–6).

[4] On the Board's petition for rehearing, the court amended in part its original modification of the Board's order (Pet. App. 7–8).

The court held that substantial evidence supported the Board's finding that the Union intended, by its picketing at the construction projects, to induce work stoppages by employees of contractors other than the Company, in violation of Section 8(b)(4)(A).

ARGUMENT

1. The decision of the court was issued on August 18, 1960, and a judgment was entered the same day (see the Appendix, *infra*, p. 15). The petition for certiorari was not filed until January 9, 1961, which is more than 90 days after the judgment. Although a petition for rehearing was filed by the Board and granted in part on October 13, 1960 (Pet. App. 7), this merely related to the breadth of the order and did not affect the underlying unfair labor practice findings. Thus, it would not extend petitioner's time for certiorari. Nor would its time be extended by the fact that the court issued a decree on November 14, 1960 (Pet. App. 9), for the decree did not change any matter of substance or resolve any ambiguity in the judgment of August 18. Accordingly, under *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the petition is untimely.

2. The substantive issue here is whether there was sufficient evidence to support the Board's finding that on and after February 24, 1959, the Union's picketing at the construction projects where the employees of the primary employer, Macatee, worked together with those of neutral contractors—was aimed not only at Macatee but was directed likewise at the neutrals and their employees. While all picketing at a common situs has to some extent the purpose of influencing employees of neutral employers to leave their jobs, the

Board and the courts of appeals have firmly established the rule that if the picketing is confined as nearly as practicable to the primary employer, the picketing is legitimate primary activity; if it is unnecessarily directed at neutral employers, it is secondary and proscribed by Section 8(b)(4)(A). The court below, after examining the circumstances surrounding the picketing, concluded that there was sufficient basis to warrant the conclusion that the Union's object was a secondary one. The resolution of this particular factual question adversely to petitioner does not present an issue appropriate for review by this Court. See *Universal Camera Corp* v. *National Labor Relations Board*, 340 U.S. 474, 491.[5]

In any event, the record supports the conclusion reached below. When petitioner reinstituted the construction site picketing in February 1959, Macatee's construction employees were reporting for work daily in the vicinity of the primary picket line at Macatee's premises. Accordingly, it was not necessary to extend the picketing to the construction projects to bring the labor dispute to the attention of Macatee's construction employees. Moreover, prior to such extension, the Union had indicated a secondary object by its letter to the contractors urging them to cease

[5] Neither the 1959 amendments to the Act nor *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *National Labor Relations Board*, No. 321, this Term, certiorari granted, 364 U.S. 869, have any bearing on this case. The question presented in *Local 761* is whether the premises of the primary employer may be treated as a common situs when independent contractors and their employees work on the premises in a regular and continuous manner. The instant case is concededly a common-situs picketing situation and the only question is whether there is sufficient evidence in support of the Board's finding of unlawful purpose.

doing business with Macafee. And, in picketing at the construction projects, the Unión confirmed that its target was the neutral contractors as well as Macatee, for it picketed at times and places when only the contractors' employees were likely to be affected by the picketing, and made no attempt to explain to those employees, when they stopped work as a result of the picketing, that it was not aimed at their employers. These circumstances give support to the inference drawn by the Board, and affirmed by the court below, that the picketing had a secondary object. See *Truck Drivers Local 728* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958; *General Truck Drivers, Local 270* v. *National Labor Relations Board*, 252 F. 2d 619 (C.A. D.C.), certiorari denied, 356 U.S. 931, enforcing 117 NLRB 885; *Amarillo General Drivers, Local 577* v. *National Labor Relations Board*, 273 F. 2d 519 (C.A. D.C.), enforcing 122 NLRB 1275; *National Labor Relations Board* v. *United Steelworkers, Local 5246*, 250 F. 2d 184 (C.A. 1); *National Labor Relations Board* v. *General Drivers, Local 984*, 251 F. 2d 494 (C.A. 6); *National Labor Relations Board* v. *Truck Drivers, Local 728*, 228 F. 2d 791 (C.A. 5); *Superior Derrick Corp.* v. *National Labor Relations Board*, 273 F. 2d 891 (C.A. 5), certiorari denied, 364 U.S. 816; *National Labor Relations Board* v. *Local 294, Teamsters* (C.A. 2), No. 26, decided November 10, 1960, 47 LRRM 2085.

Contrary to petitioner's contention (Pet. 13), the Board and court of appeals did not rest their decisions on the premise that picketing at a situs removed from the permanent place of business of the

primary employer is automatically for the unlawful object of inducing secondary action. The court below long ago disapproved of such an automatic rule. *National Labor Relations Board* v. *General Drivers, Local 968*, 225 F. 2d 205 (C.A. 5), certiorari denied, 350 U.S. 914. However, it and other courts have recognized that the availability of another place to picket the primary employer is nevertheless a relevant factor to be considered along with others in determining whether there is a secondary object. Cf. *National Labor Relations Board* v. *General Drivers, Local 968, supra*, with *National Labor Relations Board* v. *Truck Drivers, Local 728*, 228 F. 2d 791 (C.A. 5); and cf. *Sales Drivers, Local 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A. D.C.), certiorari denied, 351 U.S. 972, with *Truck Drivers, Local 728* v. *National Labor Relations Board*, 249 F. 2d 512 (C.A. D.C.), certiorari denied, 355 U.S. 958. This is what the Board did here, considering the picketing at Macatee's premises as one factor in assessing the Union's object.[6]

Nor is there substance to petitioner's contention (Pet. 13–17) that the Fifth Circuit and the Court of Appeals for the District of Columbia Circuit have been applying different principles in common situs cases. The cases cited above show that both circuits, as well as others, have sustained findings that a secondary object was present on the basis of factors comparable to those which form the basis for decision

[6] See particularly Pet. App. 16, note 16, where the Board made clear that it did not adopt the Trial Examiner's conclusion that decision in this case turned upon any single factor.

here.[7] Differences in factual situations do not make for a conflict in principle.

Finally, the propriety of the Board's finding with respect to the picketing at the construction projects on and after February 1959 is not impaired by the circumstance that the earlier picketing (see *supra*, p. 4, note 3) at those projects was deemed lawful (Pet. 18). In the case of the earlier picketing the General Counsel was of the view that, not only was there no opportunity to reach Macatee's construction employees at places other than the construction sites, but there was no showing that the picketing was carried on in a manner which directed it at the neutral contractors and their employees, as was the later picketing.

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[7] Petitioner alleges (Pet. 13) a conflict between *Retail Wholesale and Department Store Union, AFL-CIO* v. *Rains*, 266 F. 2d 503 (C.A. 5), which affirmed a temporary injunction against union picketing, and *United Wholesale and Warehouse Employees, Local 261* v. *National Labor Relations Board*, 282 F. 2d 824 (C.A. D.C.), where the court refused in a later stage of the same case to enforce the Board's finding that the picketing was an unfair labor practice. No conflict can possibly exist, however, since the Fifth Circuit in *Rains*, being concerned only with whether there was reasonable cause to believe that a violation had occurred, expressly refused to consider the merits of the unfair labor practice allegations prior to the decision of the Board. 266 F. 2d at 505.

Petitioner also claims (Pet. 14, 18) that the Fifth Circuit explicitly admitted in *Superior Derrick Corp., supra*, a conflict with other circuits, and particularly with the District of Columbia Circuit decision in *Seafarers International Union* v. *National Labor Relations Board* (*Salt Dome*), 265 F. 2d 585 (C.A. D.C.). The Fifth Circuit in *Superior Derrick*, however, merely suggested "the possibility of a difference in * * * approach" from other circuits and rejected the rationale of the *Salt Dome* case, apparently because it construed

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1961.

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the latter decision too broadly. The decision in *Salt Dome* was limited to circumstances which are different from those in *Superior Derrick* and the instant case—that is, the common situs was the only place where the union could effectively picket the primary employer and there was no conduct by the union negating the primary object stated on the picket signs. This is confirmed by the cases cited in the text above, which show that, under the circumstances here, both the Fifth and the District of Columbia Circuits, as well as other circuits, have sustained a finding of secondary object. See also *Local 761, International Union of Electrical, Radio and Machine Workers* v. *National Labor Relations Board*, 278 F. 2d 282, 285 (C.A. D.C.), certiorari granted, 364 U.S. 869, explaining the limited scope of the earlier *Salt Dome* decision.

APPENDIX

JUDGMENT

Extract from the Minutes of August 18, 1960

No. 18091

NATIONAL LABOR RELATION BOARD

versus

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of an order of the National Labor Relations Board made on August 24, 1959, in proceedings known upon the records of the Board as Case No. 16–CC–91, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Board in this cause be, and the same is hereby, modified in accordance with the opinion of this Court, and as so modified, that said Order be, and it is hereby, enforced.

U.S. GOVERNMENT PRINTING OFFICE: 1961

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JAMES R

No. 638

In the

Supreme Court of the United States

OCTOBER TERM, 1960

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

1.

The Petition is Timely

The Judgment of the Court of Appeals entered August 18, 1960, modified the Order of the NLRB to proscribe narrowly only certain actions directed towards three named enterprises (Slip Opinion, pp. 6-7). After the respondent, by motion for rehearing, induced the Court to reconsider its

original Judgment, the Opinion on Rehearing of October 13, 1960, and the Decree of November 14, 1960, constituted a "reinstating and enforcing [of] certain provisions of the Board's Order which had been deleted by the original decision of August 18, 1960 * * *." Decree of November 14, Petition App. C, at p. A-10.

This constituted substantial revision of the petitioner's legal obligations, which by the prior judgment had been much more narrowly defined. It was not until the Court's entry of the broad proscription that there was such extensive deprivation of petitioner's rights as to require petition for certiorari. Whether the effective date of such judgment is October 13 (the date of the Opinion on rehearing, Petition, App. B, pp. A-7, 8), or November 14 (the date of the "Decree Enforcing * * *" Petition, App. C, pp. 9-11), the instant petition was timely.

2.

The case presents law questions. We agree that resolutions of particular fact questions adversely to petitioner does not present issues appropriate for review by this Court. Opposition, page 8ff.

But here we are not concerned with credibility questions, or the validity of fact findings. *The facts are stipulated.* Record pp. 35-70. App. to Bd. Brief, Ex. 2, pp. 1-24. The questions are not factual—rather the basic law question is posed: whether upon stipulated facts the Board may conclude as a matter of law that the stipulated facts amount to a violation of the statute.

The Opposition's assertion that there is no substance to our contention of conflict in this area of the law is belied by an opinion of the Board, rendered since the instant petition was filed. *Retail, Wholesale & Department Store Union (Perfection Mattress & Spring Co.), 129 NLRB No. 125, 47 LRRM 1121 (December 28, 1960)*. That case is the sequel to *Rains (C. A. 5), 266 F. 2d 503* and *United Wholesale (C. A. D. C.), 282 F. 2d 824*, in which the two Circuits on identical stipulated facts reached opposite conclusions. See our petition for a Writ of Certiorari, pp. 13-17. After the District of Columbia Circuit refused to enforce the Board's Order, "* * * the union again began picketing * * *. The picketing was conducted in essentially the same manner as before." *47 LRRM 1121*. While enjoining the picketing for a second time, the Board (Member Fanning dissenting) noted the Court of Appeals for the District of Columbia had set aside the earlier order, but stated it was "not entirely clear on what point the majority of the Court disagrees with the Board" and "we must, with all due respect to the Court, disagree with its interpretation of the Act and adhere to the position set forth in the Board's previous decision * * *." *Ibid.* The Board thus aligns itself with the Fifth Circuit's view and continues to disagree with the interpretation of the Act made by the Court of Appeals for the District.

Compare the assertion (Opposition p. 8) that for Supreme Court purposes the question is wholly factual, with the rationale of the Board's decisions which speak in terms of "interpretation of the Act".

4.

This Court has granted certiorari this term in No. 321 where it will be decided whether a striking union violated Section 8(b)(4)(A), the very section here at issue, by picketing a primary employer's premises at a gate reserved for use of others working on the primary employer's premises. *Local 761, International Union of Electrical etc. Workers, AFL-CIO v. NLRB and General Electric Company.* Determination that the conduct there in issue is lawful must result *a fortiori* in validation of the instant picketing. While to a great extent the considerations involved in the two cases are similar (and perhaps should be tested by consolidated argument of the two cases) yet even if the picketing there be held unlawful, there remains statutory and constitutional protection for the primary picketing in which this petitioner engaged.

WHEREFORE, petitioner prays that its petition for certiorari be granted.

Respectfully submitted,

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Date: February 17, 1961